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HAS THE COURT LEFT THE ATTORNEY GENERAL
BEHIND?—THE BAZELON-KATZENBACH LETTERS ON
POVERTY, EQUALITY AND THE ADMINISTRATION OF
CRIMINAL JUSTICE

By YALE KAMISAR*

*We promise according to our hopes,
and perform according to our fears.*

La Rochefoucauld

Distribution of the first preliminary draft of the proposed American Law Institute Model Code of Pre-Arrest Procedure last June touched off a brisk exchange of letters between Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia Circuit, who maintained that the proposed code left a good deal to be desired, and Attorney General Nicholas deB. Katzenbach, who, although he did not explicitly treat any provision of the preliminary draft, sharply challenged the conception of equality underlying Bazelon's criticism of it. By now, both the code, and the Bazelon-Katzenbach correspondence which it evoked, are surely among the most widely read and discussed "confidential" documents of our time.¹

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¹ This paper appraises the differing views of Judge Bazelon and the Attorney General on equality of treatment and the administration of criminal justice, views advanced in the course of a "debate" growing out of the judge's criticism of the aforementioned first preliminary draft of the American Law Institute project. It does not purport to appraise, as such, the A.L.I. reporters' proposals. It is clear from the Bazelon-Katzenbach correspondence itself, set forth in appendices to this paper, that copies of the judge's letter to the Attorney General, dated June 16, 1965, and of the General's reply, dated June 24, 1965, were sent "to the interested people at the American Law Institute" (presumably the four reporters and thirty-eight advisers to the project) and to others with whom the judge had "discussed this problem from time to time." The letters were "leaked" to the Washington, D. C. *Evening Star*, on August 4, 1965, where they were first published in full. They were then the subject of extensive discussion in much of the nation's press.

How the Attorney General fared in academic circles remains to be seen (the letters of Professor Anthony Amsterdam of the University of Pennsylvania Law School and Dean A. Kenneth Pye of the Georgetown University Law Center serve as evidence that his letter met something less than unrestrained enthusiasm in these quarters);² that the General fared well in the mass media is plain. Whether he enhanced his considerable stature as a student of constitutional-criminal procedure is for you to judge; that he displayed great skills as a debater cannot be denied.

Within the four corners of his letter, the Attorney General appears to be a moderate, reasonable man responding somewhat impatiently to an insatiable "liberal," to an extremist, if you will. On rereading the letter to which he is supposed to be replying, however, it is difficult to avoid the conclusion that the Attorney General did not respond to the points raised by Judge Bazelon as much as he evaded them; that he did not refute Bazelon as much as he drastically changed the terms of the debate, then proceeded quite nicely on his own terms.

Judge Bazelon centers much of his criticism of the code on its failure to provide counsel during the earliest phases of the criminal process:

[T]he proposed Code permits a suspect to retain counsel during interrogation but it deliberately fails to provide counsel for those too ignorant or inexperienced to understand their rights and their need for counsel. . . . In the teeth of *Gideon*,³ *Griffin*,⁴ *Coppedge*,⁵ and *Hardy*,⁶ the Reporter's Commentary argues that [the aforementioned proposal does not work] an invidious discrimination between rich and poor on the ground that the state has no "affirmative obligation to insure that persons in custody will not incriminate themselves" but rather that "the state must remain neutral" (pp. 231-32). But the proposed police detention and interrogation are not "neutral"

² Letter from Prof. Anthony G. Amsterdam to Chief Judge David L. Bazelon, July 2, 1965; letter from Dean A. Kenneth Pye to Prof. James Vorenberg, Reporter, A.L.J. Model Code of Pre-Arrestment Procedure, July 7, 1965. Prof. Amsterdam's letter is set forth in appendix C to this paper. Since Dean Pye's letter is in the main a fairly detailed criticism of the confidential first preliminary draft by one of the project's advisers, a criticism which evoked an unpublished reply by Prof. Vorenberg, it is not set forth in an appendix, but it is on file in the University of Kentucky and University of Michigan law libraries.

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵ *Coppedge v. United States*, 369 U.S. 438 (1962).

⁶ *Hardy v. United States*, 375 U.S. 277 (1964).

state acts. Their primary effect, unless counsel is provided, is to elicit damaging admissions from suspects. . . . If the state subjects all suspects to detention and interrogation, it is only a pretense of "neutrality" to permit those able to retain counsel to protect their rights effectively while refusing to provide equal protection to the poor and inexperienced.⁷

The Attorney General responds as if Judge Bazelon were philosophizing about "equal justice" at large, as a brooding omnipresence, when in fact the judge is talking about it in the specific context of the availability of counsel—"by far the most pervasive" of all the defendant's rights "for it affects his ability to assert any other rights he may have"⁸—at a crucial stage of the criminal process. The Attorney General responds as if Judge Bazelon were urging the state to eliminate *all* the subtle and personal "inequalities" which disadvantage some suspects and defendants—indeed eliminate all the inequalities which disadvantage some citizens whether or not they happen to affect the criminal process—when in fact Judge Bazelon is making a much more modest claim, to wit, that there is persuasive, if not controlling, authority that once the rich man is entitled to the assistance of defense counsel in the police station the poor man should not have to face his interrogators alone, should not have to shift for himself. But let the Attorney General speak for himself:

The poor are disadvantaged in many ways as against the rich; the ignorant as against the educated; the sick as against the healthy; etc. To what extent and by what means legal processes should take into account such inequalities raises difficult questions. I would suppose the answers, insofar as we can discover them, lie in other values which are sought within our system. . . .

I do not believe that regulation through judicial decision or statute of investigatory procedures should have as its purpose to remedy all the inequalities which may exist in our society as a result of social and economic and intellectual differences to the exclusion of all other purposes and values sought to be achieved in the criminal process. I do not believe that any decision of the Supreme Court, nor of any Court of Appeals, has been explicitly based on such a premise of equality.⁹

⁷ App. A, p. 487, *infra*.

⁸ Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

⁹ App. B, pp. 490-91, *infra*.

The underlying assumption of Judge Bazelon's approach is that if a code lets retained counsel into the interrogation room—as does the A.L.I. proposal—then the “equality” principle pervading *Gideon*, *Griffin*, and other cases requires devising systems to enable members of the public defender's staff or other assigned counsel to enter, too. Although I happen to agree with Judge Bazelon, the merits of this issue are debatable. The trouble is that the Attorney General does not debate them. He does not attempt to distinguish away the “fourteenth amendment equality” cases in the setting of police interrogation. He prefers to talk about equality at large, in general.

Judge Bazelon is unimpressed with the argument that if the state permits counsel in the interrogation room but does not “affirmatively insure” counsel for the indigent at this stage, it remains “neutral.” His rejection of this reasoning is reminiscent of court-appointed counsel's successful argument in *Griffin v. Illinois*:

Illinois law provides generally for appellate review of all criminal convictions, but includes no procedure by which an indigent defendant, except one sentenced to death, can secure without cost the transcript which is indispensable to full appellate review.

As Mr. Justice Jackson stated in his concurring opinion in *Edwards v. California*, 314 U.S. 160, 184-85, in which the Court struck down a California statute making it a crime to bring, or assist in bringing, an “indigent” into that State:

“‘Indigence’ in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.”

[H]ere, the indigent is prejudiced. His lack of funds deprives him of a substantial right which the state accords to others with funds. Indigence is not neutral; it is the critical fact, the very basis upon which defendants such as these petitioners are prevented from securing the benefits of full appellate review of their conviction.¹⁰

The Attorney General's reply to Judge Bazelon, is, in turn, reminiscent of the *dissent* in the *Griffin* case, where Mr. Justice Harlan scored the notion that a state must “alleviate the conse-

¹⁰ Brief for Petitioner, pp. 29-30, 32, *Griffin v. Illinois*, 351 U.S. 12 (1956).

quences of differences in economic circumstances that exist wholly apart from any state action."¹¹ The Attorney General's reasoning is even more redolent of the same Justice's dissent in *Douglas v. California*, where balking at the extension of the "fourteenth amendment equality" approach to require furnishing counsel, as well as a transcript, on appeal, Mr. Justice Harlan maintained:

Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the States may not classify as crimes acts which the poor are more likely to commit than are the rich.

Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances" The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.¹²

Justice Harlan's argument is not without its force. But it *did not prevail* in either the 1956 *Griffin* case or the 1963 *Douglas* case. In some circumstances, at least, the Court has now made plain, fourteenth amendment equality *does* impose "an affirmative duty" on the states "to lift the handicaps flowing from differences in economic circumstances," *does* require the states "to give to some whatever others can afford." If fourteenth amendment equality demands so much at trial or on appeal, why does it require so little in the interrogation room? This is the issue Judge Bazelon unsuccessfully asks the Attorney General to face.

Why did Justice Harlan's argument fail in *Griffin* and *Douglas*? I take it because a majority of the Court was convinced that "basic legal services are not of the same order, in our theory of

¹¹ *Id.* at 34.

¹² *Douglas v. California*, 372 U.S. 353, 361-62 (1963).

government, as basic medical services,"¹³ to say nothing of free tuition at a state university, or free use of water from a municipal corporation. I take it because a majority of the Court shared the views so well articulated by the Attorney General's Committee on Poverty and the Administration of Criminal Justice:

[G]overnmental obligation to deal effectively with the problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested.

The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.¹⁴

I take it, further, that Justice Harlan's views in *Griffin* and *Douglas* did not prevail because although difficult borderline cases in the application of the "equality" norm to the criminal process will necessarily arise, the availability of a transcript on appeal or of counsel at trial or on appeal are not among them, are well within the border. I take it that Justice Harlan's views did not prevail because whatever may be said for more petty "inequalities" or for more subtle, elusive "inequalities" which the Court feels powerless to eliminate, the "inequalities" which

¹³ Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 Cornell L.Q. 1, 16 (1957).

¹⁴ Attorney General's Committee, Report on Poverty and the Administration of Federal Criminal Justice 9 (1963). (The committee, often called "the Allen Committee," after its chairman Prof. Francis A. Allen, was appointed by Mr. Katzenbach's predecessor, Robert F. Kennedy.)

"disadvantaged" Griffin and Douglas were sufficiently real and tangible, and the consequence which flowed from them sufficiently important, to cause a majority of the Court to seek to correct them.

Why, then, should Justice Harlan's views prevail in the interrogation room? Is the right to counsel less important, less desirable, or less tangible there than at trial or on appeal? This is the debate which Judge Bazelon launched, but the Attorney General avoided.

Because it permits a suspect to enjoy the assistance of counsel during interrogation but fails to provide counsel at this stage for those who cannot afford it, "the proposed Code," contends Judge Bazelon, "would in practice diverge greatly from the ideal that the administration of criminal justice should avoid invidious discrimination based on wealth."¹⁵ Of course, this ideal is what *Gideon*, *Griffin* and *Douglas* are all about.

"It would be ridiculous to state," replies the Attorney General, "that the overriding purpose of any criminal investigation is to insure equal treatment."¹⁶ Indeed it would—or to state that its *overriding purpose* is to insure due process, or to forbid illegal arrests or to prevent coercive interrogations—but who has asserted this? It would be ridiculous to state that the *overriding purpose* of public transportation or public education or service in the armed forces is "equal treatment". But it does not follow that such treatment is irrelevant or even unimportant, or that segregation on public buses or in the classroom or in the Army *therefore* is defensible.

Unfortunately, some of the press chose to highlight this vacuous turn in the debate. The *Wall Street Journal* recently summarized the Bazelon-Katzenbach exchange as follows: "Judge Bazelon argued that equality should be the chief consideration [of criminal justice]. [He did not, but the Attorney General implied that he had.] Mr. Katzenbach countered that law enforcement, not equality, is the overriding purpose of any criminal investigation."¹⁷

I say the debate took a vacuous turn because here, as elsewhere, it is not profitable to talk in terms of either/or. If the

¹⁵ App. A, p. 488, *infra*.

¹⁶ App. B, p. 490, *infra*.

¹⁷ Green, *Crime and Punishment: Prosecutors Complain Supreme Court Rulings Hurt War on Criminals*, *Wall Street Journal*, Nov. 26, 1965, pp. 1, 12.

decisions the Supreme Court has handed down in the last thirty years signify anything, they mean that *sometimes* the main purpose of a criminal investigation is overridden by fairness or equality of procedure, by values and policies which do not contribute to "police efficiency" in the narrow sense. Judge Bazelon maintains that *this* is one of those times.

After all, Chief Justice Warren, speaking for a majority of the Court in *Coppedge*, did point out, alluding to Justice Schaefer's famous Holmes Lecture of 1956,¹⁸ that "the methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."¹⁹ In this same case, the Chief Justice also called attention to "our duty to assure to the greatest degree possible . . . equal treatment for every litigant before the bar."²⁰ True, the Chief Justice made this point in the setting of a statutory framework for appeals. But why is the impact of the "equality norm" any less when it is brought to bear on a statutory framework for *pre-arraignment* procedures, let alone a *model* scheme of pre-arraignment procedures?

I noted a moment ago that the fact that insuring equal treatment is not the overriding purpose of a system does not legitimate unequal treatment. Of course, just such "legitimation" has been attempted in the past. For example, fifteen years ago, the argument ran, as one sociologist described it:

The Army is not motivated by racial prejudice, and segregation is abhorrent to us. But unfortunately the Army is confronted by a condition and a duty, and not a theory. . . . Now the Army's duty is to fight battles and win wars. Therefore, the Army must maintain morale in the ranks and use its manpower with maximum efficiency. . . . The Army must take the country as it is. It must accept social patterns and keep abreast of changes, but it is not an instrument for social experimentation.²¹

At places, the Attorney General's letter—with respect to indigence, not race, of course—smacks a bit of this argument:

¹⁸ Schaefer, *supra* note 8, at 26.

¹⁹ *Coppedge v. United States*, 369 U.S. 438, 449 (1962).

²⁰ *Id.* at 446-47.

²¹ Kenworthy. *The Case Against Army Segregation*, Annals, May, 1951, p. 27.

Poverty, ignorance, and instability produced by wretched living conditions may make an individual's criminal acts more susceptible to discovery and proof. But, I am sure you will agree these same conditions are major causes of crime. So long as they exist and lead an individual to victimize his fellow citizens, government cannot and should not ignore their effects during a criminal investigation. . . .

The elimination of disabling discrimination is the primary goal of the Poverty Program, the Civil Rights Act, and numerous and expanding services in vocational rehabilitation, school assistance and medical care.²²

Nobody is suggesting that if a man is stupid enough to leave his fingerprints on the murder weapon the police must ignore this manifestation of his stupidity. Nor that if a man rapes somebody in Macy's window his instability cannot be taken into account. Nor that if old tires on a get-away car blow out, the defendant should be raised to the level of success of the rich robber with new tires and acquitted in the name of equality.

The issue is not whether poverty, ignorance or instability should be a *substantive* defense against criminal liability but whether these factors should be permitted to inhibit the proper and effective assertion of *procedural* rights *once* the criminal process has begun. The issue is not whether we should *give* the poor and ignorant so many points *because* they are poor and ignorant, but whether, because they suffer from these deficiencies, we should *deprive* them of rights and privileges they are entitled to in the abstract. Presumably these rights and privileges manifest goals and policies transcending the pursuit of alleged criminals.

The issue is not whether the government should ignore crime caused by poverty and ignorance, but whether with respect to the assertion of the privilege against self-incrimination or the right to counsel or the protection against unreasonable search and seizure, the government should exploit the influences of poverty or ignorance—or seek to minimize them. The issue is whether, once the administration of criminal justice has begun, the government “should take the country as it is.”

At one point, in a passage which received little or no attention in the press, the Attorney General does take cognizance of

²² App. B, p. 492, *infra*.

the fact that the pursuit of alleged criminals is or must be tempered by "outside" values and goals:

We limit both investigation and criminal prosecution in various ways both to protect the innocent and the personal rights (for example, privacy, freedom of movement and speech) we enjoy in our society. It is entirely proper to limit what the police may do in the course of an investigation, even if those limitations result in some of the guilty avoiding conviction. For example, we do not permit confessions to be tortured or beaten out of people, rich or poor, not because such confessions are necessarily unreliable but because these things are incompatible with decent law enforcement, and because—inevitably—the rack would be used on the innocent as well as the guilty. All this is obvious. But what may be forgotten is that each such decision to impose a limitation involves a balance of the values thus promoted against the value of discovering those guilty of crime.²³

We do not and should not permit confessions to be tortured or beaten out of people, rich or poor. Fine, but nobody is debating that issue any more. Do we, should we, permit confessions to be obtained from *poor people, but not rich*—and that will often be the effect of permitting retained counsel in the interrogation room, but not furnishing assigned counsel to those who cannot afford it—by "playing on their emotions" and using other "psychological" techniques? By "sweettalk" or by the use of pretended sympathy and other emotional appeals to establish a relationship of rapport and confidence? By condemning the victim of the crime or minimizing the seriousness of the offense? By cutting off any protestation of innocence? By wearying the person with contradictions of his assertions or by repeated accusations of lying?²⁴

²³ *Id.* at pp. 490-91.

²⁴ See Arthur & Caputo, *Interrogation for Investigators* (1959); Dienst, *Techniques for the Crime Investigator* (1952); Inbau & Reid, *Criminal Interrogation and Confessions* (1962); Mulbar, *Interrogation* (1951); O'Hara, *Fundamentals of Criminal Investigation* (1956) *passim*. Numerous extracts from these manuals may be found in Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, *Police Power and Individual Freedom* 155 (Sowle ed. 1962).

Although entitled to the assistance of *retained* counsel in withstanding these interrogation techniques, it may well be that even most suspects who can afford to hire counsel *at later stages* of the criminal process will be financially incapable of commanding the presence of counsel in the hours immediately following arrest. I have in mind the comments of a number of practising criminal lawyers, with whom I have discussed this matter, to the effect that they would charge handsomely for "dropping everything else" and rushing down to the police station in

(Continued on next page)

This is the issue, or the cluster of issues, Bazelon and Katzenbach are presumably debating. These are the practices the Attorney General, by implication at least, is willing to permit.

What Judge Bazelon is complaining about is that when we permit a suspect who can afford one to bring a lawyer into the interrogation room but fail to provide counsel at the same stage for those who cannot afford it, we insulate the rich, *but not the poor*, against what Professor Amsterdam terms "the fear and coercive pressure of what the General euphemistically calls 'imaginative and energetic investigatory questioning.'"²⁵ The Attorney General is not very sympathetic. "I have never understood," he confides to Judge Bazelon:

why the gangster should be made the model and all others raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap. I see no reason to distort the whole of the criminal process in this fashion. Because we cannot solve all crimes and convict all criminals is no reason to release those guilty whom we can convict.²⁶

(Footnotes continued from preceding page)

response to an arrestee's call, and that they would be sure to "keep the meter running" while at the stationhouse. It may well be, then, that many persons who are financially capable at most stages of the criminal process should be viewed as "indigent" at the immediate post-arrest stage, *i.e.*, eligible for stationhouse counsel at government expense. "[P]overty must be viewed as a relative concept with the consequence that the poverty of accused must be measured in each case by reference to the particular need or service under consideration. . . . A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or claim of right." Attorney General's Committee, Report on Poverty and the Administration of Federal Criminal Justice 7-8 (1963).

How often retained counsel will be unable to "drop everything else," regardless of the fee the arrestee can pay, is a matter of considerable speculation. A study of pre-*Escobedo* police practices in several mid-western cities does reveal that "retained counsel often do enter a case shortly after arrest and immediately confer with their clients or are present when the case reaches the district attorney's office. In Milwaukee, they may actually sit in on the police interrogation." LaFave, Arrest 393-94 (Remington ed. 1965).

Whether or not an attorney can usually make a personal appearance at the police station, if an arrestee is afforded prompt access to his lawyer by telephone and vice versa, it would seem that at the least an arrestee would often be able to contact, or be contacted by, an attorney (or some lawyer associated with him) and to consult briefly with him via telephone. This in itself would seem to give the affluent interrogation "subject" a significant advantage over his indigent counterpart. The former is likely to be fortified by (a) the knowledge that some lawyer "out there" is "working on" his case and (b) by emphatic, if summary, legal and tactical advice from a professional devoted solely to the interests of his client; the latter is dependent upon his captors—who obviously share the outlook and concur in the purposes of the prosecution—to warn him unbegrudgingly and unequivocally of the very rights he may utilize to frustrate them.

²⁵ See app. C., p. 497, *infra*.

²⁶ App. B., p. 494, *infra*.

"Beat the rap" has several connotations. To some, I suspect, it signifies avoiding a due penalty by *illegitimate* means. (The synonyms of "beat" include cheat, defraud, swindle, gyp, etc.) This meaning of "beat the rap" is simply not relevant. Whatever else Chief Judge Bazelon is guilty of, he cannot be charged with seeking funds for the indigent so that he, too, may bribe judges or prosecutors, so that he, too, may hire thugs to beat up witnesses or intimidate jurors. *This*, nobody is advocating; nobody is debating. In the context of the Bazelon-Katzenbach correspondence, "beat the rap" can only be shorthand—albeit hyperbolic shorthand—for avoiding a conviction despite ample evidence of guilt by availing oneself of rights and privileges the Constitution, as the Court interprets it, *permits* a defendant to invoke, *e.g.*, refusing to answer any questions, declining to take the witness stand, suppressing illegally seized evidence.²⁷

Similarly, in the context of the Bazelon-Katzenbach correspondence, "gangster" can only be shorthand—albeit again emotive shorthand—for a person who has the wealth, education or intelligence to fully avail himself of procedural protections the Constitution, as the Court reads it, *entitles* him to assert. Such a person may well be a gangster; he may also be a prominent businessman or a famous politician, or a leading surgeon or a college professor.

A subdued, expurgated version of Mr. Katzenbach's argument, although lacking much of its original "punch," may further analysis. I offer the following *restatement* of the General's position:

I have never understood why the wealthy, educated, intelligent defendant should be made the model and all others raised, in the name of equality, to his level of success in availing himself of procedural safeguards which the Constitution or statutory law permits him to utilize. This is simply the proposition that if some defendants know their rights and have the means to invoke them, all citizens should be given a like opportunity to do so, to the extent reasonably possible. I see no reason to *distort* the whole of the criminal process in this

²⁷ See Dean Pye's letter, *supra* note 2, at 8: "No one wants either the professional criminal or the guilty indigent to escape justice. No one suggests that the overriding purpose of criminal investigation is to insure equal treatment. What both Judge Bazelon and I suggest is that each citizen be entitled to the rights guaranteed him by the Constitution and that these rights be implemented by procedures which are meaningful. It is the denial of constitutional guarantees, not the coincidence of inequality with the professional criminal, which is the focal point of our dissent."

fashion. Because some defendants possess sufficient intelligence or sufficient funds to avail themselves of "prophylactic" or "deterrent" rules designed to discourage say, police interrogation methods which "offend" the Court, regardless of whether they pose a threat to the reliability of the guilt-determining process, or to discourage methods which create a substantial risk that a person subjected to them would falsely confess, regardless of whether this particular defendant did; or because some defendants have sufficient intelligence or funds to avail themselves of certain rights designed to insure other values than the pursuit of truth, *e.g.*, "privacy," "liberty" or "dignity," (the laws of search and seizure are a good example); and such fortunately endowed defendants may thereby avoid being convicted of crimes they have probably committed, is no reason to enable all defendants to do so.

I must confess I don't see *why not*. If we are willing to "free guilty men" because they were the victims of "offensive" interrogation methods or because they were subjected to interrogation techniques producing a substantial risk of unreliability, why are these methods less offensive or less risky when the defendants are poor or ignorant? If we are willing to sacrifice probative, trustworthy evidence when a defendant is rich enough to afford counsel or sophisticated or hardened enough to know his rights, why are these values less paramount and "the truth" more important when the fate of poor and ignorant defendants is at stake? To the extent that the Constitution and statutory law *entitles* the wealthy and educated to "beat the rap," if that's what you want to call it, why shouldn't all defendants be given a like opportunity?

Moreover, how does affording all defendants such an opportunity *distort* the whole of the criminal process? Isn't it more accurate to say that it irons out the distortion? Isn't it fair to say that the Attorney General is the one who is trying to *preserve* the distortion?

The Attorney General has no qualms about protecting the poor as well as the rich against brutal, violent interrogation methods. I take it this is because, without regard to the "equality norm," he accepts these decisions on the merits. For the same reason, I am sure, he would not hesitate to give the poor and the rich like opportunities to suppress evidence obtained in violation of the protection against unreasonable search and seizure. Why

then does he balk at applying the "equality norm" to the rich man's insulation against "imaginative and energetic investigatory questioning"?

He does so, I submit, because he is really against the rich man having it. He is against the availability of counsel at this stage on the merits. *Without regard* to the "equality norm" he would strike the balance in favor of the right of the interrogator to proceed against an unchampioned "subject." (The interrogation manuals almost invariably refer to a suspect as the "subject." Sometimes they even liken him to "game" to be stalked and cornered. It is only after the suspect leaves the police station and reaches the courtroom that he is rehumanized, and then, even dignified.)²⁸

True, the United States Supreme Court may have already struck the balance the other way, in favor of the privilege against self-incrimination and the right to counsel in the interrogation room. But these are the decisions, I take it the General has in mind, when he charges:

[A]s the cases have presented more and more difficult questions of fairness and propriety, I believe the judges have left the public behind, and even among judges, the margins of the consensus have been passed. The most basic investigatory methods have come to be questioned in the context of specific cases and unique factual situations, rather than after review of all of the considerations which might be thought relevant in designing rules for the system as a whole.²⁹

In context, it is difficult to see how the cases which "have left the public behind" can be the "fourteenth amendment equality" cases. The *Douglas-Griffin* line of cases deal with appellate procedures, not "basic investigatory methods." True, though written in terms of due process, *Gideon* and other assigned counsel cases

²⁸ [Editor's note] At this point in the delivery of the paper, Justice Walter Schaefer, the panelist seated nearest Prof. Kamisar, turned to him and asked him to amplify his thoughts on the proceedings in the police station. Thereupon, Prof. Kamisar briefly sketched the contrasting conditions in the "mansion" (the courtroom), where the Constitution requires so much, and in the "gatehouse" (the police station), where, until very recently at any rate, it has meant so little, a theme developed at considerable length in the professor's recently published Magna Carta Essay, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in Kamisar, Inbau & Arnold, *Criminal Justice in Our Time* 1 (Howard ed. 1965).

²⁹ App. B, p. 491, *infra*.

may also be viewed as "equal protection" cases, but to date none have arisen in a setting any earlier than "arraignment" and "preliminary hearings."³⁰

The cases which push the right to counsel back to the point of arrest, the cases which challenge "the most basic investigatory methods," are undoubtedly *Escobedo* and *Massiah*.³¹ Both, however, involved defendants who could afford to, and did in fact, retain counsel.

The underlying thrust of the Attorney General's response to Judge Bazelon is this: putting defense counsel in the interrogation room will more or less "eliminate questioning" which, in turn, will more or less cause "our system of prevention and deterrence [to be] crippled."³²

This is something less than inexorable logic. For one thing it seems to assume that the police will be unable to obtain any incriminating statements from suspects on the street, in the squad car, during the "booking period," or before counsel has arrived at the police station. For another, it appears to collide violently with the views advanced by the new Deputy Attorney General, *the very week* the Bazelon-Katzenbach correspondence "leaked" to the press, to the effect that:

People do not commit crime because they know they cannot be questioned by police before presentment, or even because they feel they will not be convicted. We as a people commit crimes because we are capable of committing crimes. We choose to commit crimes.³³

Nor is the Attorney General's position easy to square with the findings of New York Supreme Court Justice Nathan Sobel, pub-

³⁰ *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961). However, *White* concerned the evidentiary use at trial of a subsequently withdrawn uncounseled plea of guilty at the arraignment stage, "a problem not greatly different from the use at trial of an uncounseled confession given to the police rather than to a judge." Enker and Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 Minn. L. Rev. 47, 51 (1964).

³¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964). Both cases are discussed at length, with varying degrees of enthusiasm, in Enker & Elsen, *supra* note 30; Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio St. L.J. 449 (1964); Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions*, 56 J. Crim. L., C. & P.S. 412 (1965); Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21 (1965). See also, Kamisar, *supra* note 28.

³² See app. B, pp. 492-93, *infra*.

³³ Remarks of Deputy Attorney General Ramsey Clark, Annual Meeting of the American Bar Association, Miami Beach, Florida, August 9, 1965, pp. 2-3.

lished only last November, to the effect that incriminating statements "constitute part of the evidence in *less* than ten per-cent of all indictments," findings which led him to conclude that the notion "that confessions are essential to conviction in any substantial number of cases is simply carelessly [or *carefully?*] nurtured nonsense."³⁴

According to Judge Sobel:

[M]ost serious crimes are cleared by the factor—astonishing to the uninformed—that in nearly *all* assaults; in 35 per cent of robberies and in 45 per cent of forcible rapes, the protagonists—the victim and the perpetrator—were known to one another *prior* to the commission of the crime. Even where not known to one another, in a large percentage of these cases there is *positive* identification. Thus, neither interrogation or even investigation is *essential*.³⁵

As for homicides—where the victim is dead—the crime "prosecutors . . . usually point to . . . as dependent in a large percentage of cases upon 'confessions,'" Judge Sobel tells us, "80 per cent of all murders are committed within the family or among and between 'friends' and therefore, the 'killer' is usually *known* if indeed he does not turn himself in."³⁶

I do not claim that Judge Sobel's study is fool-proof. Indeed, I doubt it.³⁷ Moreover, his findings are based on only 1,000 in-

³⁴ Sobel, *The Exclusionary Rules in the Law of Confessions: A Legal Perspective—A Practical Perspective, Part Six*, N.Y.L.J. 1, 4-5 (Nov. 22, 1965).

³⁵ *Id.* at 5.

³⁶ *Ibid.*

³⁷ For one thing, Judge Sobel's findings do not take into account the number of cases in which, although the confession is not offered itself, leads are obtained which result in the discovery of physical evidence or witnesses. How often this occurs is a matter of considerable dispute.

During the period covered by Judge Sobel, "nine murder indictments were filed. In not a single instance was a 'confession' involved." *Id.* at 4. Shortly after these findings were published, however, New York District Attorney Frank S. Hogan offered conflicting figures of his own. He disclosed that of 91 homicide cases pending in his county, confessions would be offered in 62, or 68% of the cases and estimated that indictments could not have been obtained without a confession in 25 cases, or 27%. Even this estimate, however, was reported to be "considerably below those usually made by prosecutors and police officials." Roberts, *Confessions Held Crucial by Hogan*, N.Y. Times, Dec. 2, 1965, pp. 1, 52.

A short two weeks later, the Chief of Detectives of the City of Detroit, Vincent W. Piersante, revealed that in the nine months between January 20, 1965 (the date his department decided to notify suspects of their right to remain silent and their right to retain counsel) and October 31, 1965, confessions were obtained in 56.1% of homicide cases (as against 53.0% in 1961) but were "essential" in only 9.3% of the cases (as opposed to 20.9% in 1961). Letter and attached figures from Chief Vincent W. Piersante to Jerold Israel, Professor of

(Continued on next page)

dictments in one county, a self-styled "small sampling."³⁸ But what findings has the Attorney General offered?

I share the Attorney General's concern that "in seeking to achieve the freedom, security, legal and social justice that are at stake in our conclusions" we do not "merely . . . draw out the logic of unexamined assumptions."³⁹ I also share Professor Amsterdam's fear, however, that "the Attorney General is selective in the assumptions he will and those he will not examine."⁴⁰

"We are not so civilized," warns the Attorney General, "that we can afford to abandon deterrence as a goal of our criminal law."⁴¹ Of course we are not. Of course we cannot afford to "abandon deterrence." But who is debating *this*?

That the Attorney General would *prefer* to debate this issue is understandable. It is much easier to come out against *abolishing* the deterrent force of the criminal law than to establish that adopting the changes your opponent advocates *would bring about such a result*. And the General's issue-hopping met with success. "Equality v. Deterrence." So ran the caption of the *Time Magazine* story on the Bazelon-Katzenbach exchange. "What is the purpose of U.S. criminal justice: Equal treatment for all who are accused of crime *or* deterrence of crime?"⁴² (Emphasis added.) So began the story.

What if the Attorney General is quite right? What if the presence of counsel in the interrogation room would spell catas-

(Footnotes continued from preceding page)

Law, University of Michigan, Dec. 17, 1965, on file in University of Michigan Law Library.

In a subsequent telephone interview with Chief Piersante, he corroborated what his study indicated: the importance of confessions "varies greatly, depending upon the crime involved." For example, the chief maintained that the police were "heavily dependent on confessions in burglary investigations" (the number of confessions obtained in such investigations had dropped from 64.5% in 1961 to 32.4% in 1965; confessions were deemed "essential" in 24.3% of the 1965 cases as opposed to 53.2% in 1961), whereas recent confession-right to counsel cases had had "very little impact" on murder investigations, probably because his department's "pre-arrest investigatory procedures were especially effective and thorough with respect to this crime."

³⁸ These are the first 1,000 indictments in Kings County since January 7, 1965, the date the New York Court of Appeals required prosecutors to serve a "notice of intention" upon the defense if they propose to use confessions. In Kings County, at least, "the 'notice of intention' is filed immediately after indictment irrespective of whether the case will be ultimately disposed of by plea or trial." Sobel, *supra* note 34, at 4.

³⁹ See app. B, p. 494, *infra*.

⁴⁰ See app. C, p. 496, *infra*.

⁴¹ See app. B, p. 492, *infra*.

⁴² *Time*, Aug. 13, 1965, p. 41.

trophe for our system of prevention and deterrence? This is a good reason for shutting the rich man's lawyer out of the interrogation room, but is it a good reason for *letting him in* and doing nothing about providing counsel for the poor man?

By implication, at least, the Attorney General appears to be *defending* a system which permits a suspect who can afford counsel to bring him into the interrogation room, but which *goes no further*. Isn't the whole thrust of his letter misdirected? Shouldn't he be attacking such a system for *going too far*?

The General scolds Bazelon for overlooking that "each decision to impose a limitation [on law enforcement] involves a balance of the values thus promoted against the values of discovering those guilty of crime."⁴³ But it is he who overlooks that, with respect to the man who can afford counsel, the system being assailed by Judge Bazelon has already struck a balance in the interrogation room—in favor of the suspect's "needs" and against law enforcement's "needs," if you will. In the main, Judge Bazelon *takes it from there*.

The Judge's subsidiary point is that the resolution of the issue is constitutionally required, but his chief argument, to paraphrase the late Justice Frankfurter, concurring in *Griffin* (Bazelon does not paraphrase him, I do), is that *whether or not* a state is constitutionally required to take the first step, once it does, once it deems it so wise and just that suspects be permitted the assistance of counsel in the interrogation room, it must also take the second step; it cannot by force of its exactions draw a line which precludes, or may operate to preclude, indigent persons from securing such a champion at the same time and place.⁴⁴ It would appear that Mr. Katzenbach does not deem it wise and just to let counsel into the interrogation room. This is to oppose the first step, not the second.

Why didn't the Attorney General come right out and oppose the first step? I take it because he is persuaded either that Supreme Court precedent or the clamor of the bar or public opinion precludes shutting retained counsel out of the interrogation room.

If public and professional opinion dictated his choice, then,

⁴³ See app. B, p. 491, *infra*.

⁴⁴ Cf. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956).

to paraphrase Justice Jackson:⁴⁵ There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the poor be subjected to police interrogation in no greater measure than the rich; that the protections extended to the favored few be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only the less fortunate to be the subjects of secret and sustained police interrogation and thus to escape the political retribution that might be visited upon them if all segments of society were so affected.

What if the Attorney General felt constrained by the Constitution, as interpreted by the present Court, to accept the first step? What if he agrees that *Escobedo* cannot fairly be read so narrowly as to shut retained counsel out of the interrogation room? Then, in effect, he concedes that with respect to the rich man, arguments for an "interrogation opportunity"—arguments largely from "necessity"—have not or will not persuade the Court, have been or will be overridden by competing values and policies.

At this point, I submit, it is impermissible for the General to *contain* the impact of what he probably considers a bad decision by weighing *de novo* the *same values* the Court weighed, and *this time* striking the balance *against* the generality of suspects. Indigence is not a convenient valve for reducing the impact of a decision the government opposes *on the merits*.⁴⁶ This, I take it, is what "equal protection" for rich and poor is all about.

I do not deny there may be legitimate reasons for not applying the equality norm to "a process whose contours have already been shaped" for the financially capable.⁴⁷ I only contend that *disliking the way* the process has been shaped is not one of them. Application or non-application of the equality norm, I think it plain, must rest on analysis and reasons quite transcending approval or disapproval of the original decision, must be judged by "neutral principles," if you will.⁴⁸

⁴⁵ Cf. *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (concurring opinion).

⁴⁶ Cf. *Coppedge v. United States*, 369 U.S. 438, 450 (1962).

⁴⁷ Cf. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 19 (1964).

⁴⁸ Cf. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15, 17, 19 (1959), reprinted in *Selected Essays on Constitutional Law* 463, 472, 474, 475 (1963).

What are some of the "legitimate reasons" for not applying the "equality norm" to a given process? I suggest the following factors:

(1) Financial, manpower and logistic problems may be insurmountable.

(2) The disparity may not be substantial or vital. For example, the argument may be made that counsel need not be furnished to an indigent attacking a judgment collaterally because the assistance of counsel at trial and at every level of appellate review has reduced the possibility of error to the barest minimum.⁴⁹

(3) The maximum adverse consequences may be trivial. For example, the argument may be made that for this reason counsel need not be furnished to an indigent charged with spitting on the sidewalk or burning leaves without a permit or overparking.⁵⁰ In the case of simple traffic offenses the vast number of such violations would also bring factor (1) into play.

(4) The differences may be too elusive and subtle. This is one of the reasons that once minimal standards of competency are satisfied, we do not measure assigned counsel's performance against that of the best retained counsel. Factor (1) is certainly important here, too.

I venture to say that the Attorney General does not resist application of the "equality norm" for any of the reasons or kinds of reasons suggested above. At least he has not advanced any of these reasons. Indeed, he resists the pressure for "equality" not on the ground that counsel in the interrogation room is unimportant, but for the reason that it is *too important*.

In fairness to the Attorney General, he does make an ingenious argument for the proposition that the gap between the rich suspect who can afford to hire counsel and the poor man who cannot is really quite minimal:

[W]hen any crime is in issue those who have respectability at stake, and who could have a lawyer at their command, cannot afford to appear guilty. Calling a lawyer for protection from investigation, or refusing to answer questions, does often give the appearance of guilt, and as a consequence the rich will

⁴⁹ See Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 9-13 (1963).

⁵⁰ See *id.* at 62-88.

often talk, and, if guilty, will often provide incriminating evidence.⁵¹

Now, it turns out, the suspect who has a lawyer at his command is not likely to be a gangster after all, but rather a respectable rich man.

"As a consequence the rich will often talk." What are the underlying assumptions at work here? That most men "who could have a lawyer at their command" are respectable whereas most men who could not have a lawyer at their command are not? That respectable men suspected of murder will not call a lawyer for protection (somebody forgot to tell Dr. Sheppard about this), but unrespectable men would—if they could? What was it the General said about not drawing out "the logic of unexamined assumptions"?

We can permit the rich man to enjoy the benefit of counsel in the interrogation room because quite often he won't avail himself of it. But we cannot make counsel available to the poor man at this stage because too often he will assert this right. So the argument, as I understand it, runs. The General's felt need to harmonize the apparent disparity in treatment between rich and poor at this early stage is commendable, but I do not believe he succeeds.

A FINAL REFLECTION

You will recall from the *Book of Acts* that when a crowd demonstrated against the Apostle Paul:

The chief captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him.

And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman and uncondemned?

When the centurion heard *that*, he went and told the chief captain, saying, Take heed what thou doest; for this man is a Roman.

Then straightway they departed from him . . . and the chief captain also was afraid, after he knew that [Paul] was a Roman, and because he had bound him.⁵²

⁵¹ See app. B, pp. 493-94, *infra*.

⁵² *Acts* 22:23 (King James).

There is no indication that either the chief captain or the centurion ever wondered: Why do we use the lash to extort confessions from *any person* under Roman rule? Is it because such methods are necessary or simply that they are familiar? If the lash *is* necessary, why don't we use it against *all* prisoners, Romans as well?

Many centuries later, in Cleveland, Ohio, when approached by officials who suspected him of murdering his wife, a man of wealth and distinction sought to take advantage of his "Roman citizenship." He submitted to questioning only when his family and attorneys agreed that he might. At one point he cited "his present emotional condition and his present state of fatigue" as good cause for not being subjected to further interrogation. After consulting his attorneys, he declined to take either a lie detector test or a "truth serum" injection.⁵³ But the public, at least the press, did not draw back afraid.

"Why all of this sham, hypocrisy, politeness, criss-crossing of pomp and protocol in this case?" asked the *Cleveland Press*. "In the background of this case," protested the *Press*, "are . . . hired lawyers [and] a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected."⁵⁴

Can it be said that the reaction to Dr. Sheppard's assertion of his "Roman citizenship" marks progress over the reaction to the Apostle Paul's assertion? In a way, yes. This time, at least, the disparity in treatment between Romans and the generality of suspects did not go unnoticed. This time, although the wrong answers were suggested, at least questions were asked.

I am confident that if we ask enough questions about these matters, the right answers will emerge. The only thing we have to fear is that, like the Romans of old, we will simply assume that we already have the answers, that what is familiar is what is right.⁵⁵

⁵³ See generally Holmes, *The Sheppard Murder Case* 39-48 (Bantam Books ed. 1962), and newspaper reports collected therein.

⁵⁴ *Cleveland Press*, July 20, 1954, p. 1.

⁵⁵ The "insulated chambers afforded by the several States" are sometimes an advantage. But they may be too well insulated. Someone once wisely said that the basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it. And it is easy indeed to get used to a particular procedural system. What is familiar tends to become what is right. Schaefer, *supra* note 8, at 7.

APPENDIX A

Chambers of
David L. Bazelon
Chief Judge

June 16, 1965

Honorable Nicholas deB. Katzenbach
Attorney General
Department of Justice
Washington, D.C.

Dear Mr. Katzenbach:

In light of our recent discussions about the administration of criminal justice, it was with particular interest that I read your very fine speech to the University of Chicago Alumni. You have rightly pointed to the needs to examine how theoretical legal rights work in practice and to "re-evaluate the divergence of ideal and practice." In line with this concern, I believe you may share my misgivings about Articles 1, 2, and 3 of Preliminary Draft Number 1 of the proposed American Law Institute Model Code of Pre-Arrest Procedure.

The Code proposes twenty-minute detention of a citizen to "aid in the investigation or prevention of a crime" and dragnet arrests where "it is likely that only one or more but not all of the persons arrested may be guilty of the crime." The Code also approves police questioning of a suspect from four to twenty-four hours after his arrival at a police station. These provisions would, in my experience, primarily affect the poor and, in particular, the poor Negro citizen. I doubt that police would, for example, arrest and question the entire board of directors of a company suspected of criminal anti-trust violations although it might be "likely that only one or more but not all . . . may be guilty of a crime." It is not apparent to me, however, that prosecuting authorities have had notable success in detecting or combatting such "white collar crimes" as anti-trust violations or tax frauds. I cannot understand why the crimes of the poor are so much more damaging to society as to warrant the current hue and cry—reflected in the proposed Code—for enlarging police powers which primarily are directed against those crimes.

It is also likely that, in some instances, professionals who engage in organized crime may be held and questioned by police. But these suspects know their rights and counsel is ordinarily available to them. Thus the discriminatory working of the proposed Code is most

graphically revealed in the provisions regarding availability of counsel during police interrogation.

The proposed Code permits a suspect to retain counsel during interrogation but it deliberately fails to provide counsel for those who cannot afford it, or for those too ignorant or inexperienced to understand their rights and their need for counsel. The Code provides that retained counsel may be present during police interrogation, though the Reporter suggests, as an alternative proposal, that retained counsel may be excluded from the interrogation though he would be permitted to consult with his client prior to the interrogation.

In the teeth of *Gideon*, *Griffin*, *Coppedge* and *Hardy*, the Reporter's Commentary argues that neither proposal regarding counsel works an invidious discrimination between rich and poor on the ground that the state has no "affirmative obligation to insure that persons in custody will not incriminate themselves" but rather that the "state must remain neutral." (pp. 231-32) But the proposed police detention and interrogation are not "neutral" state acts. Their primary effect, unless counsel is provided, is to elicit damaging admissions from suspects. (The Commentary suggests that detention and interrogation may also permit the suspect to exculpate himself. But the presence of counsel would aid rather than inhibit this purpose.) If the state subjects all suspects to detention and interrogation, it is only a pretense of "neutrality" to permit those able to retain counsel to protect their rights effectively while refusing to provide equal protection to the poor and inexperienced.

The Code's alternative proposal—that retained counsel be excluded from the interrogation—would partially eliminate one blatant discrimination between rich and poor by impeding the ability of the rich to protect their rights. But a major distinction between rich and poor would remain: those who could afford it would have some support from counsel; the poor have none.

In any event, elimination or curtailment of counsel's role in the interrogation procedures raises grave doubts about the fairness of those procedures. The source of these doubts is revealed in the Commentary's rationale for the Code's refusal to appoint counsel during police interrogation:

the expenditure of large public funds is not justified to assure that in *all* cases in-custody interrogation can be effective only for the purposes of exculpation and *never* for inculpation. (p. 228, emphasis supplied.)

The clear premise of this argument is that no one, if advised by counsel, would volunteer inculpatory statements. Since the Commentary cannot assume that counsel would coerce a suspect to remain silent, I

think this argument is an implicit admission that counsel's presence militates against the confusion or fear or insufficient understanding of his rights which prompt a suspect to speak.

Indeed, the Commentary itself admits that the "atmosphere [of a police station] tends to be one of confusion and indeterminacy" (p. 207) and it is, I think, coercive to many who are accustomed to view the police as hostile. In such atmosphere, the Code's intricate provisions for police warning of rights will be ineffective. Counsel, unlike the police, has no transparent interest in eliciting self-incrimination, and he ordinarily is more detached and knowledgeable than a relative who may, according to the Code, be present or consulted during interrogation. Since the Code refuses counsel to those most likely to be detained and interrogated, its claims ring hollow that "the suspect retains a meaningful choice as to whether and how much he will cooperate in the inquiry" (p. 186) and that it "provide[s] equal access [for rich and poor?] to sufficient information to make choice meaningful." (p. 214)

Moreover, these Code provisions fail to take account of a vital consideration set out by the Allen Committee in its *Report on Poverty and the Administration of Federal Criminal Justice*:

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. (Report, at p. 10.)

The police interrogation procedure approved by the Code requires "constant, searching, and creative questioning" to insure its fairness and even its compliance with the elaborate Code provisions. The Code's failure to see the need for counsel "at all stages" of the criminal process is at sharp variance with the philosophy of the Criminal Justice Act of 1964, and with the Allen Report and the policies of the Department of Justice which led to that landmark Act.

The proposed Code would in practice diverge greatly from the ideal that the administration of criminal justice should avoid invidious discrimination based on wealth. But the Code and the Reporter's Commentary fail to follow your injunction in the University of Chicago speech: that we must "admit what we are doing . . . not merely for the sake of symmetry, but for the sake of social honesty,—and, indeed, for the sake of better controlling crime." I hope you share my concern,

and I welcome your comments in the same spirit of open-minded investigation which characterized your University of Chicago speech and our recent conversations.

Unless you see some objection, I would like to furnish a copy of this letter to some of those with whom I have discussed this problem from time to time and to the interested people at the American Law Institute.

Cordially,
David G. Bazelon

APPENDIX B

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

June 24, 1965

Honorable David L. Bazelon
Chief Judge
United States Court of Appeals for
the District of Columbia Circuit
United States Courthouse
Washington, D. C

Dear Judge Bazelon:

The kind reference in your recent letter to my remarks in Chicago was most gratifying. I am happy you agree that we cannot continue public discussion of problems in the administration of the criminal law without recognizing our actual practices and inquiring into the reasons for them. A viable resolution of the issues we face is indeed possible only if we pull all the considerations into the open and honestly attempt to balance the competing goals of our society.

The underlying assumption of your approach appears to be some conception of equality. No one, of course, would argue with "equal justice under law" or any other formulation. Nor do I propose to argue that purely formal conceptions of equality may have unequal impact in law as they do in virtually every aspect of our life. The poor are disadvantaged in many ways as against the rich; the ignorant as against the educated; the sick as against the healthy; etc. To what extent and by what means legal processes should take into account such inequalities raises difficult questions. I would suppose the answers, insofar as we can discover them, lie in other values which are sought within our system. It would be ridiculous to state that the overriding purpose of any criminal investigation is to insure equal treatment. Obviously, criminal investigation is designed to discover those guilty of crime. We limit both investigation and criminal prosecution in various ways both to protect the innocent and the personal rights (for example, privacy, freedom of movement and speech) we enjoy in our society. It is entirely proper to limit what the police may do in the course of an investigation, even if those limitations result in some of the guilty avoiding conviction. For example, we do not permit confessions to be tortured or beaten out of people, rich or poor—not because such confessions are necessarily

unreliable but because these things are incompatible with decent law enforcement, and because—inevitably—the rack would be used on the innocent as well as the guilty. All this is obvious. But what may be forgotten is that each such decision to impose a limitation involves a balance of the values thus promoted against the value of discovering those guilty of crime.

In recent years we have taken steps to make the process fairer to the poor—by providing counsel, by revising bail procedures, etc. But in none of these efforts has equality been our overriding objective—nor should it be. We provide counsel in order to insure that the innocent are not wrongly convicted, that they may raise defenses which help preserve the integrity of the judicial process. We do it for our sake, not for theirs. And we are providing bail procedures because we believe that in many instances financial condition is irrelevant to the purposes sought to be promoted by bail. Again, it is not a welfare program, but one designed to better effectuate the purposes of bail.

In short, I do not believe that regulation through judicial decision or statute of investigatory procedures should have as its purpose to remedy all the inequalities which may exist in our society as a result of social and economic and intellectual differences to the exclusion of all other purposes and values sought to be achieved in the criminal process. I do not believe that any decision of the Supreme Court, nor of any Court of Appeals, has been explicitly based on such a premise of equality. The courts have been attempting, in the cases before them, the same difficult balance of goals, a balance all the more difficult for lack of an adequate public and legislative discussion of the issues.

In general, over the past quarter century, appellate decisions marking off broad new areas of reform in criminal procedure have gained public acceptance and the full support of law enforcement officers, prosecutors, and judges alike. But as the cases have presented more and more difficult questions of fairness and propriety, I believe the judges have left the public behind, and, even among judges, the margins of the consensus have been passed. The most basic investigatory methods have come to be questioned in the context of specific cases and unique factual situations, rather than after review of all of the considerations which might be thought relevant in designing rules for the system as a whole. As a result, policemen, district attorneys, and trial court judges have become increasingly unsure of the law with respect to arrest and post-arrest procedures, often differing vigorously among themselves. In your own court of appeals,

the result is too often determined by the particular panel which hears a case. Thus the consistency, the efficiency, and consequently the fairness of justice have suffered.

Your suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, strikes me as particularly irrelevant. The simple fact is that poverty is often a breeding ground for criminal conduct and that inevitably any code of procedure is likely to affect more poor people than rich people. For reasons beyond their control, in Washington many poor people are Negroes; in Texas, Mexicans; in New York City, Puerto Ricans. A system designed to subject criminal offenders to sanctions is not aimed against Negroes, Mexicans, or Puerto Ricans in those jurisdictions simply because it may affect them more than other members of the community.

There are, of course, inequities in our society resulting from differences in wealth, education, and background, and these inequities are sometimes reflected in the outcome of the criminal process. Poverty, ignorance, and instability produced by wretched living conditions may make an individual's criminal acts more susceptible to discovery and proof. But, I am sure you will agree these same conditions are major causes of crime. So long as they exist and lead an individual to victimize his fellow citizens, government cannot and should not ignore their effects during a criminal investigation. Otherwise, so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled.

This would in fact increase the suffering of the less favored in our society, for it is they who live in the high-crime areas and they who are the usual victims of crime. Investigation is not a game. It is a deadly serious public responsibility, whatever the crime. Losses and injuries which may appear small are often crushing to the victims involved. We are not so civilized that we can afford to abandon deterrence as a goal of our criminal law.

Thwarting detection and prosecution would also close the door to the rehabilitative correctional system, which is appropriately designed to ameliorate the effects of social injustice.

Indeed, it is questionable whether similarity of outcome is even relevant to the design of a process which seeks to separate out the innocent before charge and to make possible the trial of those who appear guilty. The elimination of disabling discrimination is the primary goal of the Poverty Program, the Civil Rights Act, and numerous and expanding services in vocational rehabilitation, school assistance, and medical care. It is one of the goals of the Criminal

Justice Act, which recognizes that counsel make a positive and essential contribution to the further separation of the innocent from the guilty in adversary proceedings and to appropriate dispositions. Society gains in all these. But absolute equality of result could be achieved in the investigatory stage—after a crime has been committed and before a trial is possible—only by deliberately foregoing reliable evidence and releasing guilty men. Acquittal of the guilty does not promote social justice.

Moreover, acquittal of the guilty in the name of equality of treatment may prevent our achieving other, more fundamental goals also contained in the ideal of equal justice. Fairness is owed to those who obey the law, and to those guilty who are convicted. Many undergo hardship and rigorous self-discipline while observing the restraints of the law, and are unjustly disadvantaged if some are permitted to break the law with impunity. And to a man convicted because he was careless in leaving a fingerprint, or too poor to change his tell-tale clothes after a crime, there is no more galling governmental act than the release of one who betrayed himself because he was careless in answering a question. Furthermore, in the elimination of questioning a high price would be paid by the innocent who are exculpated early in the criminal process by police questioning, and by those who appear at first to deserve a more serious charge than is eventually filed after questioning. The introduction of counsel at this early stage would not, as you suggest, promote this screening, for there must be the possibility of an incriminating as well as an exculpatory outcome if there is to be imaginative and energetic investigatory questioning.

The interests are subtle and complex. When analyzing our system in terms of the concept of equality, it seems to me wholly arbitrary to choose as groups for comparison only some of the poor guilty and some of the rich guilty.

In any event, I do not think the dissimilarities in outcome for rich and poor are so great as you suggest. The failure to arrest a Board of Directors for questioning about an antitrust violation does not strike me as an example of unequal treatment. The investigations of anti-trust violations and of violent urban crime are simply not comparable, and the anonymity and mobility of modern urban life often do not permit postponement of arrest when crimes of violence are involved. Moreover, when any crime is in issue those who have respectability at stake, and who could have a lawyer at their command, cannot afford to appear guilty. Calling a lawyer for protection from investigation, or refusing to answer questions, does often give the appearance of guilt,

and as a consequence the rich will often talk, and, if guilty, will often provide incriminating evidence.

You are right, I fear, that "professionals who engage in organized crime" frequently succeed in avoiding conviction under our system. But I have never understood why the gangster should be made the model and all others raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap. I see no reason to distort the whole of the criminal process in this fashion. Because we cannot solve all crimes and convict all criminals is no reason to release those guilty whom we can convict.

Discussions such as ours, now stimulated by the American Law Institute's draft code, are being generally undertaken with regard to the design of our whole system of criminal law. My chief concern is that in seeking to achieve the freedom, security, legal and social justice that are at stake in our conclusions, we do not permit the real issues to be obscured. If the issue is conviction of the innocent, then we must specifically examine that. If it is the coercion of the socially disadvantaged, then we must discuss that carefully and realistically. If it is the meaning of the privilege against self-incrimination, or the likely effect, and proper function of counsel, then we must turn to that on its merits. But we cannot afford merely to draw out the logic of unexamined assumptions. The stakes are too high.

I have no objection, of course, to your releasing your letter to anyone you wish, and should you desire you may append this reply to it.

Sincerely,

Nicholas deB. Katzenbach
Attorney General

APPENDIX C

MEMORANDUM*

To: Reporters and Members of the Advisory Committee on the Model Code of Pre-Arraignment Procedure of the American Law Institute.

From: Anthony G. Amsterdam, Professor of Law, University of Pennsylvania.

Date: July 6, 1965

Gentlemen:

You have all seen copies of the correspondence between Chief Judge Bazelon and the Attorney General of the United States on the subject of the Model Code of Pre-Arraignment Procedure. Being deeply troubled by the Attorney General's letter—as by Preliminary Draft No. 1 of the Code—I make bold to enclose a copy of my own letter to Judge Bazelon, containing my reflections on the subject. Although my letter is primarily responsive to the Attorney General's, it has sufficient pertinency to the Code, I think, to justify my troubling you with it. I am sending a copy to the Attorney General as well.

I should add one comment. I see the issues presented by the Code and by the Attorney General's letter as very different issues than those which are presented by the judicial decisions referred to by the Attorney General on [p. 491] of his letter. Evaluation of the propriety of a constitutional decision by an appellate court must always take account of the limited function of the Constitution in our legal order, and of the limited role of courts interpreting the Constitution in prescribing norms for our democratic society. While I myself do not think that the Supreme Court of the United States has gone too far in its decisions setting constitutional limits of permissible police procedures—particularly in view of the default of state legislatures, administrators and courts generally in the area—I can understand the cries of those who think that the Court has made the restraints of the Constitution too tight. I can understand them, that is, insofar as they rest upon the proposition that not every procedural safeguard which is desirable is thereby constitutionally compelled. But the converse of this proposition should also not be forgotten by those who have invoked it in criticizing the Court. A procedural safeguard which is not so fundamental as to find a place among the limitations which the

* Only personal references have been deleted. [Ed.]

Constitution imposes upon all the organs of government is not thereby an undesirable safeguard for adoption by a civilized and self-confident society among whose aspirations is a high regard for the individual. As I see the Code, it attempts to state not the most repressive constitutionally permissible procedures, but those procedures which should commend themselves for general adoption today. Similarly, the Attorney General's letter purports to speak, I think, on the level of "ought," not on the level of "must." And on the level of "ought," for the reasons stated in my letter, I can understand neither the Attorney General nor the Code.

July 2, 1965

Honorable David L. Bazelon
United States Court of Appeals
United States District Courthouse
Constitution Avenue and John Marshall Place, N.W.
Washington, D.C. 20001

. . . I thought I had become pretty tough in the gut by now—if I had not, the callousness of the ALI "Model" Code would have made me so—but I retain enough squeamishness to be shocked by General Katzenbach's letter. Surely it is frightening self-deception in the highest legal officer of the United States to think that he is "recognizing our actual practices and inquiring into the reasons for them" (p. 490), that he is eschewing "the logic of unexamined assumptions" (p. 494), while he reasons from such premises as "We are not so civilized that we can afford to abandon deterrence as a goal of our criminal law" (p. 492)—as though we knew anything about the deterrent efficacy of the criminal sanction, particularly in its operation upon classes driven by our society into open and not unrighteous hostility to law—or "the rehabilitative correctional system, which is appropriately designed to ameliorate the effects of social injustice" (*ibid.*)—as though our prisons were not, more than our slums, cesspools of social injustice and breeding grounds of crime. I sadly fear that the Attorney General is selective in the assumptions he will and those he will not examine.

I must pass over, *dubitante*, his assertion that "the dissimilarities in outcome for rich and poor are [not] so great" (p. 493). In my own experience, first as a prosecutor in the District of Columbia and now as a consultant and litigator for the N.A.A.C.P. Legal Defense Fund, such a suggestion is sheer Alice in Wonderland. But my experience is doubtless far more limited than that of the General and, in any event, this factual quibble is mooted by the General's overriding view

that equality in treatment of criminal suspects is a value of small concern. His letter never quite states this in words, but since the obvious generalizations which he does state—for example, “I do not believe that regulation . . . of investigatory procedures should have as its purpose to remedy all the inequalities which may exist in our society . . . to the exclusion of all other purposes and values . . .” (p. 491)—are neither responsive to your letter nor adequate to support the General’s reasoning from them unless they mean something cruder than they say. I take them to mean what they must mean in order to take the General where he goes. And this is, in short, that equality is a pretty unimportant value in the criminal process.

I cannot agree with this, for two reasons. The first is that we are not talking simply about equality at large, and certainly not about “similarity of outcome” (p. 492), as the Attorney General suggests. We are talking about equality of access to fundamental protections in the criminal process, of equality in the procedures through which some outcome is reached. We are talking about equal availability of the privilege against self-incrimination, of the right against detention on suspicion, of insulation against the fear and coercive pressure of what the General euphemistically calls “imaginative and energetic investigatory questioning” (p. 493). The General’s proposition is that it is unimportant that these protections are unavailable to those too ignorant to claim them and too poor to engage a lawyer for their vindication. That makes them unavailable, by the General’s own admission, to the classes of persons most likely to be prosecuted for crime (see p. 492), unavailable, in short, in most of the cases in which they were designed to operate. I am not yet so cynical as to believe that the statesmen and judges who expressed the high aspirations of our society in these guarantees mean them only as window-dressing for a system in which the accepted and ordinary practice was that they were to be lost by ignorant and involuntary waiver. Nor can I forget that equality of procedure is synonymous with regularity of procedure and that in a world where even the best of men (among whom I shall include *arguendo* the police of Chicago, Illinois, of Philadelphia, Pennsylvania, and of Philadelphia, Mississippi) sometimes surrender to the delusion of infallibility, regularity of procedure is all that protects the citizen against conviction of crime by the policeman and imposition of punishment through “investigatory” detention and brow-beating interrogation.

More important, I fear the Attorney General forgets that even judicial conviction and commitment of criminals is itself only a means, not an end. The end is a safe, secure society for all of us who live in

it. That end is more efficiently attained, I am sure the General would agree, by encouraging citizen cooperation to law than by perfecting the means for apprehending and punishing the disobedient. For the most part, encouraging obedience and punishing disobedience are mutually consistent, even mutually supporting means. They cease to be consistent when the powers given officials to apprehend and punish the disobedient are so unconstrained that their exercise arouses citizen resentment and contempt for law. Nothing so much arouses resentment and contempt for law as arbitrariness and inequality of treatment at the hands of officers of the law. The observation in your letter (p. 486) that the police are far more likely to use the powers given them against the poor Negro than against the criminal who is white of collar and of face is—you will pardon my saying so—not original with you. I have heard the same thing said, in different words, by poor Negroes in Chester, Pennsylvania and in Jackson, Mississippi. Some of them were engaged in peaceful civil rights demonstrations; some were throwing rocks. The Attorney General fears that "the judges have left the people behind" (p. 491). I have no doubt that "the people" of whom the Attorney General speaks are the comfortable middle and upper classes—to which both the Attorney General and I belong—who imagine themselves always as potential victims of crime, never as potential victims of a police investigation. But the courts have not left this "people" behind so far as the police have left behind the Negroes in Washington, D.C., the Mexicans in Texas, the Puerto Ricans in New York City. The decisions of the judges have attempted to set bounds for the conduct of the police which, if accepted by the police, may go some distance toward causing the police, and the law, to be more acceptable to those whose conduct the criminal law, in the main, aims to regulate. The essence of the decisions is regularity and equality. The ALI subordinates those values and the Attorney General appears to debunk them—both, doubtless, in the view that a hard-headed practicality compels their recognition as illusions. To me, nothing is so infuriating as this sort of half-sighted practicality. I am myself middling law-abiding; but if anything could put me in the ranks of the rock-throwers, it would be the conviction that our high public officers, such as the Attorney General of the United States, charged with responsibility as the legal representative of all "the people," entertain an indifference verging on contempt for our society's commitment to equality and impartiality in the administration of the criminal law. . . .

Best regards,
Anthony G. Amsterdam